83-1252

No. ..-...

IN THE

Supreme Court of the United States

October Term, 1983

NEURO AFFILIATES d/b/a CROSSROADS HOSPITAL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions Presented.[1]

A. Whether the NLRB and Court of Appeals erroneously refused to set aside an NLRB conducted representation election where the Union engaged in material misrepresentations, attempted entrapment of the Employer, mass discriminatory challenges and other irregularities which destroyed the laboratory conditions necessary to insure a fair and free election.

B. Whether the Court of Appeals improperly utilized an "abuse of discretion" standard of review of factual determinations made by the NLRB, where the "substantial evidence" test is the proper standard.

C. Whether the NLRB and Court of Appeals erroneously upheld factual determinations made by the NLRB Regional Director, where the evidence relied upon by the Regional Director was not part of the record before the NLRB and the Court of Appeals.

D. Whether the NLRB and Court of Appeals erroneously denied Crossroads' right to a hearing on the above-stated issues, where Crossroads presented evidence which made a prima facie showing of facts sufficient to set aside the election.

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[1]The following parties have an interest in the outcome of this case. The Petitioner herein is Neuro Affiliates d/b/a Crossroads Hospital (herein "Crossroads" or "Employer"). Comprehensive Care Corporation is one of the partners in the joint venture partnership forming Neuro Affiliates, and Hospital Affiliates Corporation is the other partner in the joint venture partnership.

Hospital and Service Employees Union Local 399, Service Employees International Union, AFL-CIO (herein "Union"), was the charging party in the administrative proceedings before the National Labor Relations Board (herein "NLRB"), which is the Respondent herein.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on November 4, 1983.

Citations to Opinions Below.

The Report on Objections of the Regional Director, NLRB Region 31 (Case 31-RC-5029), printed in Appendix A, *infra*, was not officially reported. The Decision and Certification of Representative issued by the NLRB in Case 31-RC-5029, printed in Appendix B, *infra*, was not officially reported. The Decision and Order of the NLRB in Case 31-CA-12030, 263 NLRB No. 29, printed in Appendix C, *infra*, was not officially reported. The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit (consolidated case numbers 82-7507, 82-7631),

printed in Appendix D, *infra*, was not officially reported. The Judgment of the Court of Appeals in this case, printed in Appendix E, *infra*, was not officially reported.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 4, 1983, Appendix E, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 29 U.S.C. § 160(e).

Statutes Involved.

The United States statutes involved are Sections 8(a)(1), 8(a)(5), and 9(c) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a)(1), 158(a)(5), 159(c), 49 Stat. 451-453 (1935), and 28 U.S.C. § 2112(b), 72 Stat. 941 (1958), as amended by 80 Stat. 1323 (1966). These statutory provisions are set forth in Appendix F, *infra*.

Statement of the Case.

Petitioner is an acute psychiatric care hospital for juveniles in Van Nuys, California. This case arose upon the filing of an Election Petition by the Union on March 9, 1981.[2] On April 3, the parties executed a Stipulation for Certification upon Consent Election. The NLRB conducted an election among the employees in the stipulated unit on May 15. Of the 76 eligible voters, 67 cast ballots, of which 36 were cast for the Union, 17 were against the Union, 13 ballots were challenged and 1 ballot was void. The Union made 11 of the 13 challenges.

On May 22, Crossroads filed timely objections to the Union's pre-election conduct in making material misrepresentations, attempting to entrap Crossroads into making unlawful promises of benefits, and improperly using Board

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[2]All dates herein refer to 1981 unless otherwise specified.

regulation of election campaign to ridicule Crossroads. Crossroads objected to one of the Union's last-minute leaflets[3] mailed to employees' homes, in which the Union dared Crossroads to sign guarantees of improved wages and benefits. The Union deceptively failed to tell employees that it would be illegal for Crossroads to sign such guarantees. In this manner the Union attempted to entrap Crossroads into committing a serious unfair labor practice if it signed the guarantees, or alternatively, to ridicule Crossroads for refusing to sign written promises.

Crossroads also objected to the Union's conduct during the voting when the Union used mass challenges of only pro-employer voters, discriminating in favor of pro-Union voters in the same classification. The Union had signed a stipulation at the prior representation hearing with Crossroads, specifically agreeing that group leaders, psychological interns, hospital clericals and dietary employees, could vote in the election. Yet on election day the Union repudiated the agreement and challenged the voting eligibility of only *some* employees in these agreed upon classifications. The Union selectively challenged *only* the pro-employer employees, while allowing pro-Union employees in these classifications to vote unchallenged. The Union challenged only employees who it thought were pro-employer, and it even later admitted this in a note from its election observer to challenged voters.[4] Crossroads objected to this trickery because it intimidated pro-employer voters and gave employees the impression that the Board's election procedures were fixed in favor of the Union.

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[3]The leaflet entitled "A GUARANTEE TO YOU" is attached as Exhibit A to Appendix A, *infra*, the Report on Objections.

[4]The note of the Union election observer, Bruce Powers, is attached as Exhibit C to Appendix A, *infra*, the Report on Objections.

Despite the strong evidence presented by Crossroads supporting its objections, the NLRB Regional Director in his Report (Appendix A, *infra*) issued July 23, overruled all Crossroads' objections and refused to set aside the election. He also ignored the important and material factual and legal issues raised by the objections and refused to order a hearing on the objections, as Crossroads had requested. On March 4, 1982, the Board issued its Decision and Certification of Representative, adopting the Regional Director's decision and summarily dismissing Crossroads' objections.

In order to seek reconsideration and review of the Board's decision, Crossroads wrote the Union on March 15, 1982, that it would refuse to bargain pending appeal. The Union filed a charge on March 26, 1982, alleging Crossroads had refused to bargain in violation of §§ 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5), 158(a)(1). The General Counsel issued a Complaint alleging a refusal to bargain on April 23, 1982. Crossroads filed its Answer to the Complaint on May 5, 1982. On May 17, 1982, the General Counsel filed a Motion for Summary Judgment, and on May 26, 1982, the Board issued the Order Transferring Proceeding to the Board and Notice to Show Cause.

In opposing summary judgment Crossroads again requested a hearing on the substantial material factual issues raised by its objections and supporting evidence. It also again asked the Board to review *all* the relevant evidence relied upon by the Regional Director. On August 10, 1982, the Board in summary fashion denied the request for a hearing, declined to review the entire record, and again summarily upheld the Regional Director's decision.[5]

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[5]The Decision and Order of the NLRB is printed in Appendix C, *infra*.

This decision was a final order of the Board, and because Crossroads was engaged in business within California and the alleged unfair labor practice occurred there, the United States Court of Appeals had jurisdiction under § 10(f) of the NLRA, 29 U.S.C. § 160(f). Crossroads timely filed the Petition for Review on September 2, 1982. The NLRB filed a Cross Application for Enforcement on October 14, 1982. Crossroads filed with the Court of Appeals an Application for Leave to Correct Omissions from the Record under F.R.A.P. 16(b) to require the NLRB to place all relevant evidence considered by the Regional Director before the court. By Order dated December 22, 1982, that court referred Crossroads' motion to the panel which considered the case.

On November 4, 1983, by Memorandum Decision (Appendix E, *infra*) the Court of Appeals enforced the Board's order and dismissed Crossroads' petition for review. The court held that the Union leaflet daring Crossroads to make unlawful promises "did not constitute a material misrepresentation or significantly impair the election process."[6] It also held that the discriminatory mass challenges of pro-employer voters by the Union, and the NLRB agent's allowance of such promiscuous challenges, did not impugn the Board's election standards. The court also held, without even seeing the affidavits submitted by the Union to the Regional Director and relied upon by him in his decision, that it was "harmless error" for the Board to review this

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[6]The Court of Appeals failed to even mention, let alone distinguish, the directly contrary authority of *Jamesway Corp. v. NLRB*, 676 F.2d 63 (3d Cir. 1982), which Petitioner had cited to the court on this issue. The Court of Appeals also appeared to use an "abuse of discretion" test as the standard of review of the NLRB's factual findings, which is directly contrary to the Third Circuit's use of the substantial evidence test in *Jamesway, supra*.

important evidence in the case.[7] Finally, despite the evidence presented by Crossroads in support of its objections, the court found no substantial, material factual issues present justifying an NLRB hearing on the objections.

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[7]The Court of Appeals ruling in this regard is contrary to the authority of all other circuits, which have considered this issue, and have held that *all* evidence considered by the Regional Director must be forwarded to and considered by the reviewing Board and appellate court.

NLRB v. North Electric Co., 644 F.2d 580, 582 (5th Cir. 1981); *NLRB v. Curtis Noll Corp.*, 634 F.2d 1027 (6th Cir. 1980); *Randall Burkhart/Randall Division of Textron, Inc. v. NLRB*, 638 F.2d 957 (6th Cir. 1981); *Prestolite Wire Division v. NLRB*, 592 F.2d 302 (6th Cir. 1979); *NLRB v. Cambridge Cloth, Inc.*, 622 F.2d 1195, 1198 (4th Cir. 1980); *NLRB v. Decibel Products*, 657 F.2d 727 (5th Cir. 1981); *NLRB v. Klinger Electric*, 656 F.2d 76, 81 (5th Cir. 1981); *ATR Wire and Cable Co. v. NLRB*, 671 F.2d 188 (6th Cir. 1982); *NLRB v. Consolidated Liberty, Inc.*, 672 F.2d 788 (9th Cir. 1982); *NLRB v. Advanced Systems, Inc.*, 681 F.2d 570 (9th Cir. 1982); *NLRB v. ARA Services, Inc.*, 678 F.2d 440, 444, n. 9 (3d Cir. 1982). *See*, Gaal, "The NLRB's Misuse of Witnesses' Statements in Election Proceedings," CCH Labor Law Journal, January, 1982, pp. 17-25.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals' Refusal to Find the Attempted Entrapment of the Employer by the Union and Its Use of Mass, Discriminatory Challenges Against Pro-Company Voters to Be Objectionable Conduct Conflicts With Applicable Decisions of Other Circuits and Condones Unfair Election Practices.

The Union in this case used deceptive and coercive campaign and election misconduct immediately before and during an NLRB conducted representation election[8] to improperly influence the employee voters in the election. The Union used NLRB regulation of employer campaign conduct in an attempt to entrap the Employer into committing an unfair labor practice, or alternatively, to ridicule the Employer. The Court of Appeals in this case ignored the directly relevant authority of the Third Circuit in *Jamesway Corporation v. NLRB*, 676 F.2d 63 (3d Cir. 1982), and condoned the Union's deceptive practices.

In the leaflet, "A GUARANTEE TO YOU" (Exhibit A to Appendix A, *infra*) the Union made signed and sworn guarantees to the employees. It dared Crossroads to swear to and sign guarantees for improved wages, sick leave, health insurance and grievance and arbitration procedure. The leaflet then stated, "WE SIGN OUR GUARANTEES—SEE IF THE CORPORATION WILL SIGN THEIRS." The Union's leaflet asserted that Crossroads

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[8]This case is especially important as it involves issues of the fundamental fairness of the NLRB's representation election procedures and the Board's regulation of campaign conduct. According to agency statistics, the NLRB conducts some 7,000 to 8,000 elections annually involving between 400,000 and 500,000 eligible voters. Objections are filed by the election parties in 8 to 10 per cent of these elections. *Annual Reports of the NLRB* (1978-1981) (Chart 11).

would not sign guarantees. Crossroads, however, was legally precluded from making guarantees of improved wages and benefits during the critical pre-election period, though employees could not, of course, be expected to know the state of the law. Yet, the Union leaflet nefariously omitted this crucial fact. In essence, the Union was daring Crossroads to commit a serious unfair labor practice or suffer ridicule and rejection for not signing guarantees. This campaign trickery during the final days before the election misled the employees and thereby affected the outcome of the election. Even worse, the Union utilized the Board's own regulation of employer conduct to ridicule Crossroads and attempt to entrap it into committing an unfair labor practice.

In a virtually identical case, *Jamesway Corp. v. NLRB*, 676 F.2d 63, 69-72 (3d Cir. 1982), the Third Circuit recently reversed the Board and found that such attempted entrapment and ridicule warranted setting aside an election. In *Jamesway* on the eve of the election (as is the case here), the union presented the employer with a written demand for a written guarantee that there would be no layoffs in the future. When Jamesway refused to sign the guarantee, the union distributed the unsigned document that evening and on the morning of the election with a notation that the employer refused to sign the guarantee. The Board, as here, found nothing objectionable about such conduct because the handbill was literally true (*i.e.*, the employer had refused to sign the guarantee). But the Third Circuit disagreed, finding such attempted entrapment and ridicule warranted setting aside the election. The Third Circuit quoted Blake's "Auguries of Innocence," stating, "A truth that's told with bad intent Beats all the Lies you can invent." *Id.* at 70 n. 10.

The Third Circuit noted that an employer is prohibited from signing such a guarantee because to do so would be

tantamount to bargaining with the union before the election, and amounting also to an unlawful pre-election promise. *Id.* at 70 n. 9. It found that distribution of the unsigned guarantee "created the impression that unless the Union were elected, newly hired workers faced the risk of layoff." *Id.* at 70. It also found that job security was a material subject which would impact on voter free choice, and because of the timing the employer had no opportunity to respond. Thus:

> "The handbill's message was not simply a general representation that the Union could better protect the job security of employees.* * * Rather, the handbill indicated that Jamesway's specific failure to guarantee the job security to its employees in writing—a promise Jamesway could not lawfully have made on the eve of the election, *supra* at note 9—demonstrated that the jobs of the newly hired employees were at peril without the Union." *Id.* at 71.

Based on this attempted entrapment and ridicule of the employer, the Third Circuit set aside the election.

Likewise here the unsigned "guarantee" received by employees two days before the election could not be effectively answered, because Crossroads did not receive a copy until the afternoon of the day before the election.[9] The Union challenge dealt with matters of central concern to employees—wages, sick leave, health insurance, and a grievance procedure. *See NLRB v. Sunkist Growers, Inc.*, 532 F.2d

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[9]Additionally, Crossroads was placed in a no-win situation where it could not possibly make any effective reply even if it had had ample time to do so. *Hanes Corp. v. NLRB*, 677 F.2d 1008 (4th Cir. 1982) (No reply possible where union called employer's attorney a "shyster"); *Bauer Welding and Metal Fabricators, Inc. v. NLRB*, 676 F.2d 314 (8th Cir. 1982) (employer could not effectively rebut union's inaccurate statement of NLRB law that employer can never reduce wages or benefits).

1239 (9th Cir. 1976). As in *Jamesway*, the Union's trickery clearly gave employees the impression that without the Union no improvement in these critical areas could be achieved.

Although the directly relevant *Jamesway* decision was cited and argued at length by Crossroads in its appeal, the Ninth Circuit failed to even mention this case in its decision, and it found nothing objectionable in the Union's use of this deception. The Ninth Circuit's refusal to follow the applicable *Jamesway* precedent creates a conflict in the circuits on this important issue of election campaign misconduct. The Ninth Circuit's decision also condones and even encourages Unions to use deceptive campaign practices, including misuse of the NLRB's own election regulations, to ridicule the Employer and confuse the voters.

II.

The Court of Appeals' Use of an "Abuse of Discretion" Standard to Review Factual Determinations Made by the NLRB Conflicts With Applicable Decisions of Other Circuits Which Require That the Board's Factual Findings Be Supported by Substantial Evidence on the Record as a Whole.

The Court of Appeals applied an "abuse of discretion" standard of review to *both* the Board's legal and factual findings. Its standard of review was as follows:

> "Because we find that the Board *did not abuse its discretion* in certifying Hospital and Service Employees Union Local 399 (the union) as bargaining agent for Neuro Affiliates' employees, we enforce the board's order." (Emphasis added).

This "abuse of discretion" standard of review conflicts directly with the Third Circuit's *Jamesway*, *supra*, decision which explicitly rejects that standard in favor of the stricter "substantial evidence" test. *Id.*, 676 F.2d at 66-69. In

Jamesway the NLRB argued that the standard of review of NLRB determinations of election misconduct was an abuse of discretion standard, but the Third Circuit strongly disagreed, stating:

> "The Board in its attempt to limit the power of review exercised by this Court over the Board's determination regarding the conduct of elections confuses the standard of review a court should use to examine the propriety of election procedures and policies established by the Board with the standard appropriate for review of the Board's application of those procedures and policies to specific elections. That confusion is understandable, since our decisions have not carefully articulated the distinction. *Nonetheless, the substantial evidence standard remains the proper one under which Board determinations regarding the impact of alleged misconduct on the fairness of an election must be judged.*" *Id.*, 676 F.2d at 67. (Emphasis added).

Later in its decision the *Jamesway* court again reaffirmed that substantial evidence must support the Board's determinations regarding election misconduct. The court stated:

> "Assuring the reasonableness of the Board's determinations is precisely what is required under the substantial evidence test, which we now reaffirm is to be applied to Board determinations regarding the effect of alleged misconduct of an election. In determining whether a particular incident so disrupted an election as to warrant setting the election aside, a court must satisfy itself that the Board's determination regarding the impact of the incident at issue is supported by substantial evidence on the record considered as a whole". *Id.*, 676 F.2d at 69.

The Third Circuit's *Jamesway* decision, applying the "substantial evidence" test, thus conflicts directly with the

Ninth Circuit's use of an "abuse of discretion" standard in this case. Applying different standards to similar facts, these courts reached directly opposite results. On an issue as important as the standard of review to be applied by the circuit courts in NLRB election misconduct cases a uniform test is necessary, and this Court should resolve this conflict among the courts of appeals.

III.

The Failure of the NLRB and the Court of Appeals to Review All Evidence Relied Upon by the NLRB Regional Director in Making His Factual Determinations Violates Due Process and the Established Rule in Four Other Circuits.

It was of course impossible for the Court of Appeals to determine whether substantial evidence *on the record as a whole* supported the NLRB's findings in this case, because the court did not possess all the evidence relied upon by the NLRB Regional Director in his Report on Objections. The Board itself did not have all the evidence before it when it decided the case, because the Regional Director did not forward the Union-submitted affidavits to the Board. Five Circuits, including the Ninth Circuit, have condemned the NLRB's practice of failing to review all the evidence before determining whether objectionable conduct occurred.[10]

Only the Ninth Circuit has adopted a "harmless error" exception[11] to the universal rule in the circuit courts that the reviewing NLRB and court must review all the evidence.

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[10]See cases cited at footnote 7, *supra*.

[11]In the instant case and in *NLRB v. Eskimo Radiator Mfg. Co.*, 688 F.2d 1315 (9th Cir. 1982) the Ninth Circuit refused to reverse the Board for failing to review all the evidence relied upon by the Regional Director in making his factual findings on the grounds that this failure was harmless error.

The primary fallacy in the Ninth Circuit's harmless error approach is that without reviewing all the evidence it is impossible for the court to determine whether or not the omitted evidence is harmless.

In a rash of recent cases, the NLRB's attempts to "stonewall" behind technical procedural rules to keep evidence relied upon by the Regional Director from being reviewed by the Board and later by the courts have been flatly rejected by the federal appeals courts. In the seminal case, *Prestolite Wire Division v. NLRB*, 592 F.2d 302 (6th Cir. 1979), the Sixth Circuit interpreted the predecessor Section 102.69(g)[12] of the Board's rules and the court decided that this rule normally required the Regional Director to transmit the entire record to the Board, rather than placing the burden on the employer. The court reasoned that effective judicial review of the Regional Director's decision required a consideration of all the evidence relied upon by him. In the instant case, as in *Prestolite*, Crossroads was entirely without power to transmit affidavits taken by the Board agents from Union officials, employees or others. These affidavits which were relied upon by the Regional Director in his decision were not part of the record before the Board or Appeals Court.

Following the Board's continued failure in other cases to require transmission of the entire record to the Board and to the court, the Sixth Circuit went beyond *Prestolite* and

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[12]In the wake of *Prestolite* and the numerous other cases requiring the Regional Director to transfer all evidence relied upon by him to the Board and to the courts, the Board amended Section 102.69(g). The NLRB's interpretation of the new regulation still conflicts with the law in the circuit courts, because its interpretation does not require the Regional Director to transmit all evidence relied upon by him to the Board and courts. Hence, the Board's practice still violates due process, precludes judicial review, and is contrary to 28 U.S.C. § 2112(b). *NLRB v. Advanced Systems, Inc.*, 681 F.2d 570, 573, 574 (9th Cir. 1982).

ruled that the entire record must be sent to the Board and Courts in all cases. *NLRB v. North Electric*, 644 F.2d 580 (6th Cir. 1981); *NLRB v. RJR Archer Inc.*, 617 F.2d 161 (6th Cir. 1980); *NLRB v. Curtis Noll Corp.*, 634 F.2d 1027 (6th Cir. 1980); *Randall Burkhart v. NLRB*, 638 F.2d 957 (6th Cir. 1981); *ATR Wire and Cable Co. v. NLRB*, 671 F.2d 188 (6th Cir. 1982).[13] The Sixth Circuit in *NLRB v. North Electric, supra*, held that it is an abuse of discretion for the Board to adopt the report of the Regional Director without reviewing all the evidence he relied upon. The court stated:

> "If the Board does not look at the evidence it can do nothing but rubber stamp the Regional Director's decision. Meaningful review is impossible without a review of the evidence. In addition, if the Board does not review the evidence and make it part of the record, it is impossible for a court to review the Board's action, since there is no record to review. *We hold that it is an abuse of discretion for the Board to adopt the report of the Regional Director without reviewing the documentary evidence relied upon by the Regional Director.*" (Emphasis added). *Id.*, 644 F.2d at 584.

The Fourth Circuit followed *Prestolite* in *NLRB v. Cambridge Wire Cloth Co., Inc.*, 622 F.2d 1195, 1198 (4th Cir. 1980), and remanded the case to the Board with instruction that *all* the evidence before the Regional Director be trans-

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[13] *In NLRB v. ARA Services Inc.*, 678 F.2d 440, 444 n. 9 (3d Cir. 1982), the Third Circuit cited with approval the Sixth Circuit's *ATR Wire, supra*, decision and stated, "we are troubled by the fact that the Board did not have all relevant materials upon which the Regional Director based his ruling." The Court did not reverse the Board *only* because the employer did not present the question in the first instance to the Board. In the instant case, of course, Crossroads has presented this issue to the Board twice, in its Exceptions to the Regional Director's Report and in its Opposition to Summary Judgment (See Agency Record Items No. 11, 12, and 20).

mitted to the Board and subsequently to the court. Likewise, in *NLRB v. Decibel Products*, 657 F.2d 727, 729 (5th Cir. 1981), the Fifth Circuit adopted the *North Electric* rule and remanded the case to the Board to consider all the evidence. The court held that the Board's failure to review all the evidence denied the employer procedural due process and was an abuse of discretion.

In *NLRB v. Klinger Electric Corp.*, 656 F.2d 76, 81 (5th Cir. 1981), the Fifth Circuit relied upon the Board's own regulations and due process to require transmission of the entire record to the Board and court. The court further relied upon 28 U.S.C. § 2112(b) which states that the record on review in agency proceedings includes "evidence" before the "agency, board, commission or officer concerned." It stated:

> "Furthermore, *regardless of the Board's own procedures*, 28 U.S.C. §2112(b) requires that affidavits used as the evidentiary basis of decisions of the regional director and the Board must be part of the record available to this court in its review of those decisions. Of course, this statute does not impose requirements upon the internal procedures of the Board, but administrative efficiency is certainly served if the Board has before it the same record that we will require for appellate review of the Board's decision." (Emphasis added).

The Ninth Circuit initially stated its agreement with the Sixth Circuit's *North Electric* holding. *NLRB v. Belcor, Inc.*, 652 F.2d 856, 859 (9th Cir. 1981). It joined the group of courts critical of the Board's failure to review the entire record in election objection cases. In *NLRB v. Consolidated Liberty, Inc.*, 672 F.2d 788 (9th Cir. 1982), the Ninth Circuit reversed the Board because of the Regional Director's failure to forward the entire record to the Board. The court remanded the case to the Board "*for further proceedings*

at which it must consider all relevant evidence which was before the Regional Director." *Id.*, 672 F.2d at 790 (Emphasis added). The Court cited, relied upon, and approved *Klinger Electric, supra*, and *North Electric, supra*, stating:

> "If the Board does not look at the evidence, it can do nothing but rubber stamp the Regional Director's decision, and this could raise serious due process problems." *Id.*, 672 F.2d at 790.

In *NLRB v. Advanced Systems, Inc.*, 681 F.2d 570 (9th Cir. 1982), the Ninth Circuit reaffirmed its ruling in *Consolidated Liberty*.

In the instant case and in *NLRB v. Eskimo Radiator Mfg. Co.*, 688 F.2d 1315 (9th Cir. 1982), the Ninth Circuit deviated from the established rule in the circuit courts and created the "harmless error" exception, without even reviewing the omitted evidence to determine whether it was material or harmless. Such an abdication of the court's judicial review responsibility denied Petitioner due process and is directly contrary to the decisions of all other circuits which have addressed this issue. This Court should grant certiorari to correct the lower court's glaring error and achieve uniformity among the circuit courts.

IV.

The NLRB and Circuit Court Denied Petitioner a Hearing on Substantial and Material Factual Issues, Despite Crossroads' Presentation of Evidence Strongly Proving That the Union Used Mass, Discriminatory Challenges to Intimidate Pro-Company Voters.

The NLRB Regional Director, the Board, and the Court of Appeals have all thus far denied Crossroads and its employees a hearing on the significant factual issues relating to the conduct of the election. The Board's own rules and the pronouncements of the circuit courts require a hearing

on election objections which raise "substantial and material factual issues."[14]

Crossroads presented substantial evidence which demonstrated that the Union used mass challenges to discriminate against and intimidate pro-employer voters.[15] The Regional Director made an enigmatic factual determination that the Union had no discriminatory (or as he termed it "anti-Union") motive in making the challenges (Appendix A, p. 9). He improperly based his finding in part on evidence received from Union witnesses which was unavailable to the Board and was not in the record on appeal before the Ninth Circuit.

The Court of Appeals erroneously held that Petitioner's presentation of evidence showing mass, discriminatory challenges by the Union of pro-employer voters was insufficient basis for a hearing or for setting aside the election. It stated that further evidence of such challenges "could not have affected the outcome of this case" (Appendix D, p. 38), holding that even if the Union's invidious motive was apparent to the voters waiting in line to vote, the mass challenges had no impact on the election.

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[14]29 C.F.R. 102.69(d).

[15]Crossroads presented *prima facie* evidence (an affidavit by employee Estrella Gonzalez) that the Union's improper use of discriminatory challenges disrupted the election by showing: (1) the extraordinary number of challenges; (2) Gonzalez's statement that she personally knew at least 8 of 11 voters challenged by the Union were anti-union and that pro-union employees in the same classifications were not challenged; (3) the last-minute nature of the challenges; (4) a note from Union election observer Powers, admitting that he discriminatorily challenged employees simply because they were against the Union; (5) Gonzalez's statement that she and other voters were upset by being challenged because of their pro-employer sympathies. Despite Crossroads' strong evidence that the discriminatory, mass challenges disrupted the election and impacted on the voters, the Board and lower court refused to set aside the election or hold a hearing.

What the Board and Circuit Court refused to recognize is that such mass, discriminatory challenges against known pro-employer voters is, as a matter of law, misconduct which has an immediate impact on the voters' free and unfettered choice. There is little doubt that the Board and Ninth Circuit would not allow other forms of invidious discrimination by the parties to an election. They would certainly not allow a Union to intimidate and harass black voters by making mass challenges of all black employees on the ostensible basis that they were supervisory or professional employees, while white employees in the same job classifications (stipulated to be within the bargaining unit) were allowed to vote unchallenged. Yet the Board and court allowed nearly identical misconduct to occur in the instant case with the tacit approval of the Board election agent, the Regional Director, the Board, and the Ninth Circuit.

In a small hospital such as Crossroads, the employees almost all know each others' voting preference before an election. The NLRB itself has invoked the "small plant doctrine" in numerous cases, holding that employees and management know the pro- or anti-Union sympathies of employees in a small bargaining unit. Without having to state his discriminatory purpose, it was apparent to all employees waiting in line to vote, that Union election observer Powers was challenging all pro-employer voters. As one employee (Gonzalez) stated in her affidavit, she knew from personal knowledge that at least 8 of the 11 voters challenged by the Union, were challenged because they were against the Union. Gonzales stated regarding the Union election observer's note, "It confirms my feeling that I and other employees were challenged because of our pro-employer sentiment."

That the employees were aware of the Union's glaring discrimination is evident in the record. Group leader Witt

was upset about the Union's discriminatory challenge of her and denounced it in front of voters waiting in line to vote. The Board agent unwittingly lent further weight to the appearance of bias by ordering Witt to leave the voting area. The Board has held that, "The final minutes before an employee casts his vote should be his own, as free from interference as possible." *Michem, Inc.*, 170 NLRB 362 (1968). Here, in the final seconds before voting, the Union discriminatorily challenged eleven pro-employer voters on a specious basis, while pro-union voters voted unmolested. No clearer harassment of pro-employer voters could be shown. The Board's processes were prostituted, giving the election procedures the appearance of partiality favoring the Union. These factors had a definite impact on the voters as they waited to cast their ballots, and upon the challenged voters who correctly believed they were singled out because of their anti-Union views. The *prima facie* evidence presented by Crossroads requires that a hearing be held. Both the *effect* of the discriminatory challenges on employees and the *motive* for the challenges depend on a determination of the state of mind of Powers and of the challenged employees, findings which cannot be made via summary judgment. The Board's use of summary judgment to determine state of mind is improper. *Valley Rock Products v. NLRB*, 590 F.2d 300 (9th Cir. 1979).

Rather than remand the case back to the Board to hold an evidentiary hearing, however, the court simply accepted all of the employer's factual allegations as true, stating:

> "Since no evidentiary hearing was ever had, we are bound on this record to accept as true the company's version of the alleged incidents. . . ." *Id.*

Accepting as true the evidence produced by Petitioner here would establish the unlawfully motivated challenges by the Union which the employees viewed as improper

discrimination, affecting their free choice in the election. This is plainly grounds for overturning an election for such conduct irremediably taints laboratory conditions. Crossroads presented *prima facie* evidence of objectionable election misconduct by the Union; the Director's investigation is no substitute for a hearing. *NLRB v. Claxton Manufacturing*, 613 F.2d 1364, 1366 (5th Cir. 1980); *Anchor Inns v. NLRB*, 644 F.2d 292, 294 (3d Cir. 1981).

In *Bauer Welding and Metal Fabricators, Inc. v. NLRB*, 676 F.2d 314 (8th Cir. 1982), the court ruled:

> ". . . where the employer has specifically controverted the subsidiary factual determinations made by the Regional Director and has offered proof which, if true, would raise material factual issues, this court has held that 'the company must be afforded the opportunity to produce evidence' at a hearing wherein the testimony of witnesses may be subject to the 'cleansing rigors of cross examination.' " (Citations omitted). *Id.*, at 316.

In *NLRB v. ARA Services, Inc.*, 678 F.2d 435 (3d Cir. 1982), the Third Circuit ruled that the Regional Director's findings were "flawed because he had not assumed the truth of [the employer's] allegations, nor were his findings the product of a hearing" in which the employer participated. The court noted the myriad due process difficulties where the Director substitutes his *ex parte* investigation for a hearing where factual conflicts are presented: (1) the union witnesses are not subject to cross-examination by the employer; (2) the union witnesses' statements can be "laundered" by the Director because they are not part of the record evidence; (3) the Regional Office may not have asked the right questions or investigated fully; (4) even the identity of the union witnesses is not known. All of these inherent due process violations are present here, where the Regional Director discounted the evidence produced by Crossroads and instead

credited the Union version of the events.

Petitioner submits that in this case where it has produced *prima facie* evidence of attempted entrapment, discriminatory mass challenges, and other abuses of Board law and processes by the Union, a hearing must be granted to insure the integrity of the Board processes. The Regional Director's cursory investigation is no substitute for a full evidentiary hearing regarding the Union's gross abuse of Board processes.

This Court should grant certiorari to correct the erroneous decisions of the Board and Court of Appeals which denied Petitioner its right to a hearing on the substantial material factual issues surrounding the Union's use of mass, discriminatory election challenges to intimidate pro-employer voters.

V.
Conclusion.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

STANLEY E. TOBIN,
JAMES A. BOWLES,
HILL, FARRER & BURRILL,
Attorneys for Petitioner,
Neuro Affiliates d/b/a
Crossroads Hospital.

APPENDIX A.

Report on Objections of the Regional Director National Labor Relations Board, Region 31, Case 31-RC-5029.

United States of America Before the National Labor Relations Board Region 31.

Neuro Affiliates d/b/a Crossroads Hospital, Employer and Hospital and Service Employees Union, Local 399, AFL-CIO, Petitioner. Case 31-RC-5029.

Report on Objections

Pursuant to a petition filed March 9, 1981,[1] and a Stipulation for Certification Upon Consent Election thereafter executed by the parties, an election by secret ballot was conducted by May 15 under my direction and supervision among employees of the Employer in the unit agreed appropriate.[2] After the election, each party was furnished a tally of ballots which showed that of approximately 76 eligible voters, 67 cast ballots, of which 36 were cast for the Petitioner, 17 were cast against the Petitioner, 13 were challenged, and 1 ballot was void. The challenged ballots are not sufficient in number to affect the results of the election.

On May 22, the Employer filed timely objections to conduct affecting the results of the election, a copy of which was duly served on the Petitioner. Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, after reasonable notice to the parties to present relevant

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[1]All dates are 1981, unless otherwise specified.

[2]Included: All psychiatric aides, licensed vocational nurses, housekeeping employees, dietary employees, Director of Volunteers, group leaders, hospital clericals, ward clerks, occupational therapy aides, recreational therapy aides, and psychology interns employed by the Employer.

Excluded: Professional employees, confidential employees, guards, all other employees, and supervisors as defined in the Act.

evidence, I have completed an investigation of the objections, duly considered all evidence submitted by the parties and otherwise disclosed by the investigation, and hereby issue this report thereon.

The Objections

The objections in their entirety are set forth in the indented paragraphs below.

Objection No. 1

> On or about May 13 and 14, 1981, Petitioner attempted to entrap the Employer into committing unfair labor practices. On these dates Petitioner mailed literature to the homes of the Employer's employees. The literature contained guarantees to the employees sworn to and signed by officials of Petitioner. On the opposite page were a list of guarantees which the Petitioner dared the Employer's Administrator, Barbara Landis to sign. The guarantees included promises of wage increases, promises of improved sick leave benefits, promises of an improved health insurance program, and promises of the institution of a grievance and arbitration procedure. The timing of the communication, which was mailed to employees' homes precluded an effective reply or explanation by the Employer. The Employer could not sign the guarantee, or it would be committing an unfair labor practice by promising benefits during the critical pre-election period. The Petitioner misled employees into believing that the Employer would not (rather than could not) sign such guarantees, and at the same time attempted to entrap the Employer into committing a serious unfair labor practice. Petitioner improperly engaged in this insidious misconduct to influence the employee's choice of a bargaining representative and such was its effect.

The investigation established that Petitioner mailed a campaign brochure entitled "A GUARANTEE TO YOU"

to unit employees. (A copy of this document is attached hereto and designated Exhibit "A".) The Employer's evidence reveals that two unit employees received "A GUARANTEE TO YOU" on May 13 at their respective homes. The Employer did not present evidence concerning the date(s) on which the remaining approximately 74 unit employees received this brochure. The Employer became aware of "A GUARANTEE TO YOU" on May 14. The Petitioner states that an official of Petitioner placed all copies of "A GUARANTEE TO YOU" in the U.S. mail on May 8 in downtown Los Angeles.[3] The investigation further revealed that Petitioner distributed "A GUARANTEE TO YOU" in response to the Employer's earlier mailing to employees entitled "A LOOK AT WAGE IMPROVEMENTS FOR PSYCHIATRIC AIDES: STARTING AND TOP-HOURLY RATES." (A copy of the Employer's literature is attached hereto and designated Exhibit "B.") This document illustrates wage improvements of psychiatric aides from 1975 to 1981, and states, in pertinent part:

> . . . (P)lease note that your wage scale is competitive with other hospitals in the area, and even slightly higher on average. . . . It would also make sense for you to try to obtain similar, valid information from Local #399. We care enough to warn you against being so easily swayed by their pie-in-the-sky promises. What, *precisely*, has been offered in writing?

The investigation did not establish that the allegedly objectionable portion of Exhibit "A" materially or substantially affected the results of the election as described in Objection No. 1. The Board's standard of review for alleged misrepresentations, which has been set forth in *Hollywood*

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[3]Petitioner's office is located in downtown Los Angeles and the *Excelsior* list indicates that unit employees reside in the metropolitan area.

Ceramics Company, Inc., 140 NLRB 221, and recently adhered to in *General Knit of California, Inc.*, 239 NLRB 619, is as follows:

> [A]n election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.

Based on the evidence presented and the investigation as a whole, I conclude that the substance of the allegedly objectionable portion of Exhibit "A" does not constitute misrepresentation within the meaning of the cited cases. Petitioner's challenge to the Employer to provide written guarantees of improved wages and benefits, which is found on page 2 of Exhibit "A," amounts to no more than typical campaign rhetoric of the type amenable to employee evaluation. Taking into account the Employer's earlier challenge to Petitioner to provide written guarantees with respect to wage increases (Exhibit "B"), I conclude that Exhibit "A" was written and distributed in such a manner and style that the Employer's unit employees could readily identify it as the Petitioner's campaign propaganda. In contending that the challenge presented in Exhibit "A" constitutes deceptive campaign trickery, the Employer emphasizes that it would have committed an unfair labor practice by signing the Petitioner's challenge. While that position may be correct, it does not follow that the Employer is correct in assuming that Petitioner has abused Board processes by distributing Exhibit "A." Petitioner's brochure does not mention, directly or indirectly, the Board's law or procedures in the area of unlawful promises of benefits. Inasmuch

as I have concluded that Petitioner's challenge, as expressed in Exhibit "A," does not constitute a material misrepresentation, I further conclude that it is not necessary to decide whether the Employer had enough time to reply.

Based on the foregoing and the investigation as a whole, I conclude that the evidence with respect to this Objection is insufficient to warrant setting aside the election, and I, therefore, will recommend that Objection No. 1 be overruled.

Objection No. 2

> During the election, the NLRB agent allowed the Union election observers to make full scale challenges to the votes of only anti-Union employees, while at the same time she innocently precluded the Employer's observer, Estrella Gonzalez, the opportunity to challenge voters who were pro-Union. The appearance of bias by the NLRB seriously influenced the employees' choice of a bargaining representative.

Objection No. 3

> During the election, the Petitioner, through its election observer, subverted the NLRB's procedures for conducting a fair election by engaging in full scale challenges of the votes of *only* anti-Union employees. The Union observers engaged in an underhanded (sic*) classification vote first. Then the Union observers challenged all anti-Union employees in that classification solely on the basis of their classification. The Petitioner had stipulated to the appropriate bargaining unit, which contained these same classifications. The Petitioner was attempting to disenfranchise only anti-Union employees, and this became clear to the employees waiting in line to vote. When the Employer's election observer attempted to stop this mockery of the Board's election

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*The Regional Director misquoted the objection omitting: "scheme, whereby they had pro-Union employees in a particular".

processes by seeking instruction from the Employer's officials, she was first detained by the NLRB agent. Then, the NLRB agent allowed a pro-Union employee to vote whom Estrella Gonzalez was intending to challenge. The pro-Union employee voted while Estrella Gonzalez was seeking instructions from Employer officials. The Union's use of mass challenges to discriminate against anti-Union voters and the NLRB agent's acquiescence in this misconduct influenced the employee's choice in the election. Anti-Union employees suffered disparate treatment at the polls by the Union's misconduct and the Board agent's failure to allow the Employer's election observer to stop the Union's discriminatory challenges by proper Employer counter-challenges.

I will treat Objections Nos. 2 and 3 together inasmuch as they both raise issues relating to the manner in which challenged ballots were processed during the election on May 15. The afternoon voting session took place from 3 p.m. to 3:45 p.m. Each party exercised its privilege to have two observers present during each of the two scheduled voting sessions. The Employer's observers at the afternoon session were employees Estrella Gonzalez and Ronald Gade. Voting arrangements approved by the Board Agent in charge of the election provided that two observers, one from each party, would circulate together through the Employer's facility at the beginning of each session to announce that the polls were open. Under this arrangement, the remaining two observers were responsible for marking off voters' names from the eligibility list and for challenging voters. The Employer's afternoon observers decided that Gade would make voting announcements and that Gonzalez would remain in the polling place. Prior to the afternoon session, Gonzalez was informed that the Employer's labor relations attorneys would be available to answer questions in the administrator's

office in the facility.

During the early portion of the afternoon session, Gonzalez decided that she needed clarification on whether to challenge one particular voter, a psychology intern. According to Gonzalez, she asked the Board Agent's permission to leave the polling area to ask the Employer's attorneys if she should challenge the intern. At the Board Agent's suggestion, Gonzalez remained for a short time until Gade returned to the polling area. Upon Gade's return, Gonzalez told him that she wanted to challenge the intern. Gonzalez then, with the Board Agent's permission, left the area for a short time, departing before the intern in question had cast a ballot. Gonzalez did not ask whether the election would continue in her absence. The Employer does not assert that the Board Agent assured Gonzalez that the election would be suspended in her absence. Nevertheless, Gonzalez assumed that the intern would not be allowed to vote while she was consulting with Employer representatives away from the polling area. Before the polls opened for the afternoon session, the Board Agent had properly instructed all observers, including Gade and Gonzalez, that challenges must be made before ballots are placed in the ballot box.

Gade was present when the psychology intern in question voted, but Gade did not attempt to challenge this voter. The Employer did not provide any evidence that employees waiting to vote were aware of the fact that the Employer had missed its opportunity to challenge the intern. When Gonzalez returned a short time later, she discovered that the intern had already voted. Gonzalez stated that during her absence, she had received instructions to challenge the intern. As noted above, Gonzalez was unable to carry out these instructions. The investigation established that this was the only incident in which the Employer's observers were allegedly denied an opportunity to thwart "the Union's

scheme'' through the use of ''counter-challenges.''

The Employer further contends in Objections Nos. 2 and 3 that Petitioner manipulated the challenge procedure in various ways that passed unquestioned by the Board Agent. The Employer's position is that the Board Agent's alleged tolerance of the Petitioner's ''trickery'' and her failure to provide an opportunity for Gonzalez to challenge the intern should be viewed together as one course of conduct. Seen in this light, the Employer contends that the Board Agent's conduct ''tended to foster in the minds of the voters the impression that the Board is not neutral with regard to the choices on the ballot.'' The Employer relies upon *Glacier Packing Co.*, 210 NLRB 571.

The investigation established that of 13 challenges, Petitioner challenged 11 voters, the Employer challenged one and the Board Agent challenged one. When challenging a voter, the Petitioner's observer stated that the Petitioner's challenge was based upon the voter's status as a professional or a confidential employee. Both of these categories were specifically excluded from the unit in the parties' election agreement. In the case of two challenges, the Petitioner's observer announced the challenges after the voters had marked their ballots, but before the ballots were placed in the ballot box. The Employer did not provide any evidence that, during the critical pre-election period or during the election itself, any agent of Petitioner made any statement to, or in the presence of, employees that its challenges were based upon anti-union sympathies.

During the afternoon session, a small number of group leaders and phychology interns voiced unhappiness over the fact that they had been challenged. The Board Agent properly explained the challenge procedure to these employees and processed their challenged ballots in accord with Board procedures. When one or two of these employees attempted

to prolong this discussion, the Board Agent promptly asked them to leave the polling area so as to avoid disrupting the election. The voters who had already cast challenged ballots complied with the Board Agent's instructions. The Employer presented no evidence that any of these challenged voters reasonably believed that Petitioner had challenged them on the basis of anti-union attitudes. Similarly, the Employer presented no evidence that the Petitioner's observers engaged in any specific improper conduct during this incident. However, the Employer generally alleges that the Petitioner's challenges were motivated by considerations of voters' anti-union sympathies.[4] The Employer's evidence in support of this general allegation is that within the week following the election, Bruce Powers, an observer for Petitioner at each session, allegedly stated in writing that his reason for challenging voters was their anti-union sympathies. (A copy of Powers' two-page note is attached hereto and designated Exhibit "C." Yet, one of the Employer's witnesses stated during the investigation that at least one employee known for an anti-union viewpoint voted without challenge by Petitioner. The Employer further contends that Petitioner, in a manner as yet unidentified, controlled the order in which employees arrived to vote, thereby ensuring that employees waiting to vote watched while Petitioner's observer challenged all anti-union voters. The Employer presented no evidence to support this aspect of Objections Nos. 2 and 3.

Based upon the above and the investigation as a whole, I conclude that the manner in which challenges were proc-

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[4]The Employer did not specify in its Objections how many of Petitioner's challenges were allegedly tainted by anti-union concerns. During the investigation, one of the Employer's witnesses stated that 8 of Petitioner's 11 challenges were so tainted. This witness based her statement solely upon her own personal view of the union sympathies of the 11 challenged voters.

essed did not compromise the fair conduct of the election. The Employer's evidence is insufficient to support a finding that Petitioner's challenges were motivated by any reason other than a legitimate desire to test the inclusion of psychology interns and group leaders in the bargaining unit. The investigation established that these two classifications were included in the stipulated voting unit at the Employer's request. Petitioner agreed to their inclusion in the interest of expediting the election. During the campaign period, employee Powers was unsuccessful in communicating with employees in these classifications about unionization and the election. Powers did learn, however, that several interns and group leaders believed that they should have been excluded from the unit as professionals. Hence, Powers, as Petitioner's observer, challenged most of the interns and group leaders. Officials of Petitioner expected a post-election investigation and decision concerning the inclusion of these two classifications. While Powers' note to certain employees (Exhibit "C") is somewhat ambiguous, a fair reading of its contents does not support the Employer's position that Powers has admitted that anti-union considerations motivated Petitioner's challenges. Since Powers wrote the note days after the election, the note itself had no impact on the election process. Finally, there is no direct evidence that Petitioner engaged in any conduct that caused employees to believe that challenges were motivated by anti-union considerations.

I also conclude that the Employer's evidence is insufficient to support a finding that the Employer was unable to challenge one psychology intern due to the manner in which the election was conducted. Gonzalez chose to leave the polling area during the election when she knew that she wanted to challenge the intern. Gonzalez told Gade of her desire to make the challenge. Although fully instructed in

proper challenge procedures, Gade neglected to challenge the intern when he had the opportunity to do so. Gonzalez' assumption that the election would be suspended in her absence was based on nothing more than unfounded speculation. In all the circumstances, I conclude that the Board Agent did not abuse her discretion by continuing the election in Gonzalez' absence. Moreover, there was absolutely no discussion of this incident on the day of the election. Accordingly, there was no opportunity for other voters to be influenced by knowledge of what the Employer has asserted was the appearance of Board antipathy toward one party's right to challenge voters. See *Newport News Shipbuilding and Dry Dock Company*, 239 NLRB 82 (1978).

Inasmuch as I have concluded that the Board Agent did not tolerate Petitioner's abuse of the challenge procedure, and that the Board Agent did not interfere with the Employer's right to challenge voters, it follows that the Board Agent engaged in no conduct that tended to foster in the minds of voters the impression that the Board was not neutral as between the choices on the ballot. Thus, I also conclude that the Employer's reliance upon *Glacier Packing, supra,* is misplaced. In that case, the Board found that the Board Agent had engaged in affirmative conduct that destroyed the appearance of the Board's neutrality. I have concluded that the Board Agent herein did not engage in any such ambiguous conduct during the course of the election.

Based upon the foregoing and the investigation as a whole, I conclude that the evidence with respect of Objections Nos. 2 and 3 is insufficient to warrant setting aside the election. I, therefore, will recommend that Objections Nos. 2 and 3 be overruled.

Objection No. 4

Prior to the election and subsequent to the filing of the

Petition, the Petitioner made material misrepresentations to the Employer's employees concerning the Employer's profitability and ability to afford additional wage increases, in order to influence their choice of a bargaining representative.

The Employer's evidence indicates that on May 14, two unit employees received a package of Petitioner's literature, including a cover memo entitled "*Comp Care, Inc. dba Crossroads Hospitals.*" This packet is attached hereto and designated Exhibit "D." The contents of Exhibit "D" generally refer to the financial status and economic health of Comprehensive Care Corporation. The cover memo, which is dated May 11, identified Comprehensive Care, Inc. as the corporate owner of the Employer. Other documents in the packet referred to multiple subsidiaries of Comprehensive Care and to the many facilities it operates throughout the United States. The investigation also established that Comprehensive Care Corporation is only a 50 percent owner of the Employer.

The Employer contends that Petitioner's misrepresentation, on the day before the election, of Comprehensive Care as the sole, rather than half, owner of the Employer precluded any effective reply and affected the outcome of the election. The Employer does not contend that there is any inaccuracy or misrepresentation by Petitioner with respect to the rest of the material in Exhibit "D" concerning the profitability of Comprehensive Care Corporation. The only misrepresentation, therefore, involves the proportion in which Comprehensive Care is the owner of Crossroads Hospital. The Employer has failed to cite any case law in support of its contention that such an inaccuracy would warrant setting aside the election under the applicable standard of *Hollywood Ceramics, supra*. I do not view the Petitioner's factual error to constitute a substantial departure from the

truth in the circumstances of the instant case. Petitioner accurately identified Comprehensive Care as an owner of the Employer and accurately described its economic well-being. Further, I conclude that employees are in a position to evaluate this type of campaign propaganda as it pertains to the operations of the parent corporation and to those of the Employer. Thus, it is not necessary for me to decide whether the Employer had sufficient time for an effective reply. Based on the foregoing, and the investigation as a whole, I conclude that the distribution of Exhibit "D" does not warrant setting aside the election, and I will recommend that Objection No. 4 be overruled.

Conclusion

For the reasons set forth above and based upon the investigation as a whole, I have concluded that the Employer's Objections are without merit and that they fail to raise substantial and material issues such as would warrant setting aside the election. Accordingly, I recommend that the Employer's Objections be overruled and that a Certification of Representative in favor of the Petitioner be issued.[5]

Signed at Los Angeles, California, this 23rd day of July 1981.

/s/ Roger W. Goubeaux
Roger W. Goubeaux, Regional Director
National Labor Relations Board
Region 31

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[5]Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D. C. Pursuant to Section 102.69(g), affidavits and other documents which a party has submitted timely to the Regional Director in support of objections are not a part of the record unless included in the Regional Director's Report, or appended to the exceptions or opposition thereto which a party submits to the Board. Exceptions must be received by the Board in Washington by August 5, 1981.

EXHIBIT A

A GUARANTEE TO YOU

Since your employer seems to think that you don't need the *GUARANTEED Wages, Benefits, and Job Security* found in a LOCAL 399 contract, see if he'll sign this set of guarantees to you.

WE SIGNED OURS . . . .

WILL HE SIGN HIS?

AS THE ADMINISTRATOR OF CROSSROADS HOSPITAL, I BARBARA LANDIS, AGREE TO THE FOLLOWING GUARANTEES FOR MY EMPLOYEES IF THEY VOTE AGAINST THE UNION:

1) I *guarantee* to match and give you the highest wage increase that Local 399 has negotiated in any of their Hospitals contracts this year.
2) I *guarantee* to make sick leave paid from the first day of illness with a 100% cash-out on all unused sick leave payable on the employee's anniversary date.
3) I *guarantee* to institute a fully employer-paid Health Insurance plan.
4) I *guarantee* to revamp the grievance procedure so that every employee is entitled to be judged by an impartial arbitrator ending with a final and binding decision, and extend the grievance procedure into all areas of the job, including workload as well as terminations.

WE SIGN OUR GUARANTEES — SEE IF THE CORPORATION WILL SIGN THEIRS

I SWEAR THAT THE ABOVE WILL BE THE POLICY AT CROSSROADS HOSPITAL.

_____

BARBARA LANDIS, Administrator

AS DULY AUTHORIZED REPRESENTATIVES OF HOSPITAL AND SERVICE EMPLOYEES UNION, LOCAL 399, WE GUARANTEE THE FOLLOWING:

1) We *guarantee* that dues for Local 399 members at — Crossroads Hospital will be $8.00 a month.
2) We *guarantee* that no current employee of Crossroads Hospital will be charged any Initiation Fee.
3) We *guarantee* that Local 399 will never order its members at Crossroads Hospital out on strike!
4) We *guarantee* that no employee of Crossroads Hospital will pay any dues until thirty (30) days after they have voted by secret ballot to accept a Union Contract containing the improved wages and benefits they are happy with.
5) We *guarantee* that Local 399 will take legal action against Crossroads Hospital on your behalf because of terminations without just cause.
6) We *guarantee* to negotiate for every issue listed on the following page, and more, if you vote for the Union.

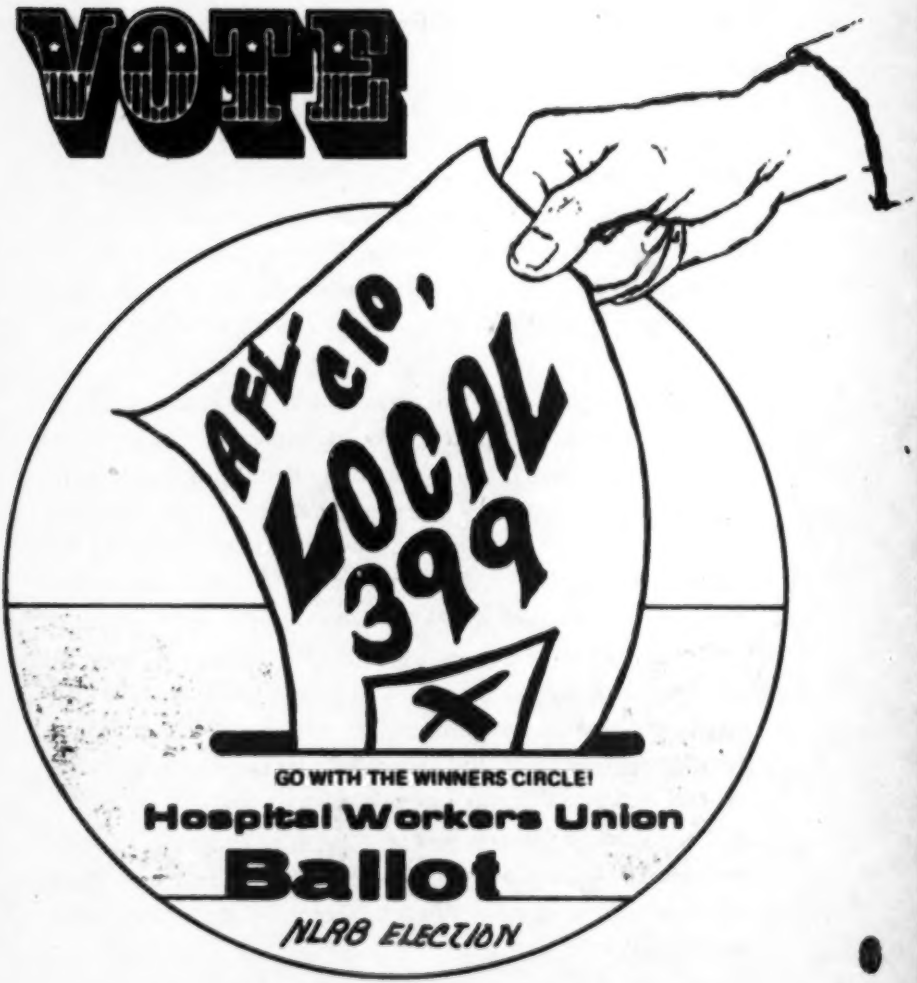
WE SWEAR UNDER PENALTY OF PERJURY THAT THE ABOVE STATEMENTS ARE TRUE.

/s/ James Zellers
JAMES ZELLERS, President

/s/ Dick Davis
DICK DAVIS, Vice-President

/s/ Gloria Marigny
GLORIA MARIGNY, Secretary-Treasurer

/s/ Dorothy Osby
DOROTHY OSBY, Associate Director of Organizing



LIKE VOTING YOURSELF A *RAISE!*

Exhibit C

Jo & Star & Sheri

Regarding last Friday's election: The reason for the challenge ballots is this. Your inclusion in the bargaining unit was asked for by the Corporation. Our choice was this — Either accept the additions or allow the election date to be delayed to perhaps mid-Summer. The choices were not easy — as the situation was deliberately created to undermine our efforts at seeking redress for our legitimate grievance.

We had hoped that we could gain your support if we had an opportunity to talk about the issues. Because I received no response to my notes to you it seemed rather obvious that you had no interest — thus the challenges. If the election results could change by resolving the challenges then the issue would have gone to an NLRB hearing because of the margin of victory — I don't believe there will be a hearing. — That doesn't really make sense — but??

If you still have no interest in the negotiation process or any union involvement could you let me know directly. I'd rather not make assumptions. We acknowledge your right to your own opinion and our intentions are to oblige your wishes but please let us know what they are.

It may be of interest to know what is happening as the process of putting together issues — proposals continues and your input is more than welcome — no matter what your opinion.

Our intention was certainly not to create hard feelings. If that is the case then I accept responsibility and offer an apology. I look forward to working many more months with all of you — Thanks

Bruce

APPENDIX B.

Decision and Certification of Representative of the National Labor Relations Board, Case 31-RC-5029.

United States of America Before the National Labor Relations Board.

Neuro Affiliates d/b/a Crossroads Hospital, Employer and Hospital and Service Employees Union, Local 399, AFL-CIO, Petitioner. Case 31-RC-5029.

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held May 15, 1981,[1] and the Regional Director's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Regional Director's findings and recommendations.[2]

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Petitioner and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment,

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[1]The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 36 for, and 17 against, Petitioner, with 13 challenged ballots, a number insufficient to affect the results of the election.

[2]In adopting the Regional Director's recommendation that the Employer's Objections Nos. 1 and 4 be overruled, Chairman Van de Water and Member Hunter find it unnecessary to pass on his reliance on *General Knit of California, Inc.*, 239 NLRB 619 (1978), since in their opinion the alleged misrepresentations do not warrant setting aside the election under any view of the applicable law.

and other terms and conditions of employment:

All psychiatric aides, licensed vocational nurses, housekeeping employees, dietary employees, Director of Volunteers, group leaders, hospital clericals, ward clerks, occupational therapy aides, recreational therapy aides, and psychology interns employed by the Employer; excluding professional employees, confidential employees, guards, and all other employees, and supervisors as defined in the Act.

Dated, Washington, D.C., March 4, 1982.

John R. Van de Water, Chairman
John H. Fanning, Member
Robert P. Hunter, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX C.

Decision and Order of the National Labor Relations Board, 263 NLRB No. 29.

United States of America Before the National Labor Relations Board.

Neuro Affiliates d/b/a Crossroads Hospital and Local 399 Hospital and Service Employees Union, Service Employees International Union, AFL-CIO. Case 31-CA-12030.

DECISION AND ORDER

Upon a charge filed on March 29, 1982, by Local 399 Hospital and Service Employees Union, Service Employees International Union, AFL-CIO, herein called the Union, and duly served on Neuro Affiliates d/b/a Crossroads Hospital, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 31, issued a complaint on April 23, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on March 4, 1982, following a Board election in Case 31-RC-5029, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about March 15, 1982,

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[1]Official notice is taken of the record in the representation proceeding, Case 31-RC-5029, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Thereafter, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and raising certain "affirmative defenses."

On May 19, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on May 26, 1982, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice to Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent denies the request and refusal to bargain. Furthermore, in its answer and its response to the Notice to Show Cause, Respondent asserts that the Union's certification was improper on the basis of Respondent's objections to the election in the underlying representation proceeding. Respondent also contends that the Regional Director abused his discretion and violated Board rules by refusing Respondent's request for a hearing on its objections and by failing to send the entire record to the Board for review, and that the Board's failure to grant a hearing on its objections and review all of the

evidence deprived it of due process.[2]

Review of the record herein, including the record in Case 31-RC-5029, reveals that an election conducted pursuant to a Stipulation for Certification Upon Consent Election on May 15, 1981, resulted in a vote of 36 for, and 17 against the Union, with 13 challenged ballots and 1 void ballot. Thereafter, Respondent filed timely objections to conduct affecting the results of the election, alleging, in substance, that (1) the Union attempted to entrap the Employer into committing serious unfair labor practices by challenging it to make written promises of benefits during the critical period; (2) the Union engaged in a scheme of mass challenges of only antiunion employees to discriminate against antiunion employees; (3) the Board agent conducting the election fostered the impression of bias by allowing the Union's challenges while precluding the Employer's election observer from making counter-challenges of prounion employees; and (4) the Union made material misrepresentations concerning the ownership and profitability of the Employer.

After investigation, the Regional Director issued his Report on Objections on July 23, 1981, in which he recommended that Respondent's objections be overruled in their entirety and that the Union be certified. Thereafter, Respondent filed timely exceptions to the Regional Director's report, in which it contended, *inter alia*, that the record should include all evidence compiled by or submitted to the Regional Director during the course of his investigation and that a hearing was warranted. On March 4, 1982, the Board,

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[2]Respondent has requested oral argument. This request is hereby denied as the record, the General Counsel's Motion for Summary Judgment, and Respondent's brief in opposition to the Motion for Summary Judgment adequately present the issues and the positions of the parties.

having considered the Regional Director's report, adopted the findings, conclusions, and recommendations of the Regional Director and certified the Union as the exclusive bargaining representative of the employees in the unit stipulated to be appropriate. It thus appears that Respondent is attempting in this proceeding to relitigate issues fully litigated and finally determined in the representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein, which it has not previously raised before the Board, which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.[4]

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[3]See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4]In its answer, Respondent generally denies pars. 8 and 9 of the complaint, which allege that the Union, commencing on or about March 19, 1982, and continuing to date, has requested and is requesting Respondent to bargain collectively with it, and that commencing on or about March 15, 1982, and at all times thereafter, Respondent has refused to do so. However, counsel for the General Counsel has submitted in support of his Motion for Summary Judgment a copy of a letter, dated March 10, 1982, which the Union sent to Respondent, requesting a meeting to commence negotiations for a contract, and a copy of a letter, dated March 15, 1982, in which Respondent's attorney advised the Union that in view of Respondent's position that the election was invalid for the reasons set forth in its objections it was rejecting

In this proceeding, Respondent contends that it is entitled to a hearing on its objections to the election. Prior to adopting the findings, conclusions, and recommendations of the Regional Director's Report on Objections, the Board considered the report, Respondent's exceptions thereto, and the entire record in that case. By its adoption of the report recommending that Respondent's objections be overruled, the Board necessarily found that the objections raised no substantial or material issues warranting a hearing.[5] Further, it is well established that the parties do not have an absolute right to a hearing on objections to an election. It is only when the moving party presents a *prima facie* showing of substantial and material issues which would warrant setting aside the election that it is entitled to an evidentiary hearing. It is clear that, absent arbitrary action, this qualified right to a hearing satisfies the constitutional requirements of due process.[6] Accordingly, we grant the Motion for Summary Judgment.

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the Union's demand to commence bargaining. Respondent does not dispute the validity of these letters. Furthermore, although Respondent contends in its response to the Notice to Show Cause that substantial and material issues exist with respect to its objections, it does not argue that a factual issue has been raised as to the request and refusal to bargan. Furthermore, Respondent has not at any material time herein expressed a willingness to bargain with the Union. Finally, it is clear from its position set forth in its "affirmative defenses" and in its response to the Notice to Show Cause that Respondent asserts it has been, and continues to be, under no obligation to bargain with the Union. Accordingly, we find that Respondent's denials of pars. 8 and 9 of the complaint raise no substantial and material issues of fact warranting a hearing. We also find that Respondent's remaining denials in its answer raise no substantial or material issues of fact warranting a hearing.

[5]*Madisonville Concrete Co., A Division of Corum & Edwards, Inc.*, 220 NLRB 668 (1975), enforcement denied 552 F.2d 168 (6th Cir. 1977); *Evansville Auto Parts, Inc.*, 217 NLRB 660 (1975).

[6]*GTE Lenkurt, Incorporated*, 218 NLRB 929 (1975); *Heavenly Valley Ski Area, a California Corporation, and Heavenly Valley, a Partnership*, 215 NLRB 734 (1974); *Amalgamated Clothing Workers of America [Winfield Manufacturing Company, Inc.] v. N.L.R.B.*, 424 F.2d 818, 828 (D.C. Cir. 1970).

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Neuro Affiliates d/b/a Crossroads Hospital is, and has been at all times material herein, a joint venture duly organized under and existing by virtue of the laws of the State of California, with an office and place of business located in Van Nuys, California, where it is engaged as a health care institution in the operation of an acute psychiatric hospital. Respondent, in the course and conduct of its business operations, annually purchases and receives goods or services valued in excess of $5,000 from sellers or suppliers located within the State of California, which sellers and suppliers receive such goods in substantially the same form directly from outside the State of California. Respondent, in the course and conduct of its business operations, annually derives gross revenues in excess of $250,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Local 399 Hospital and Service Employees Union, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All psychiatric aides, licensed vocational nurses, housekeeping employees, dietary employees, Director of Volunteers, group leaders, hospital clericals, ward clerks, occupational therapy aides, recreational therapy aides, and psychology interns employed by the Employer; excluding professional employees, confidential employees, guards, all other employees, and supervisors as defined in the Act.

2. The certification

On May 15, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 31, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on March 4, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about March 10, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about March 15, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since on or about March 15, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and

that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is 31gaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d

57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Neuro Affiliates d/b/a Crossroads Hospital is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 399 Hospital and Service Employees Union, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All psychiatric aides, licensed vocational nurses, housekeeping employees, dietary employees, Director of Volunteers, group leaders, hospital clericals, ward clerks, occupational therapy aides, recreational therapy aides, and psychology interns employed by the Employer; excluding professional employees, confidential employees, guards, all other employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 4, 1982, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 15, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Neuro Affiliates d/b/a Crossroads Hospital, Van Nuys, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 399 Hospital and Service Employees Union, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All psychiatric aides, licensed vocational nurses, housekeeping employees, dietary employees, Director of Volunteers, group leaders, hospital clericals, ward clerks, occupational therapy aides, recreational therapy aides, and psychology interns employed by the Employer; excluding professional employees, confidential employees, guards, all other employees, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Van Nuys, California, facility copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 10, 1982

John H. Fanning, Member
Howard Jenkins, Jr., Member
Don A. Zimmerman, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[7]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 399 Hospital and Service Employees Union, Service Employees International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All psychiatric aides, licensed vocational nurses, housekeeping employees, dietary employees, Director of Volunteers, group leaders, hospital clericals, ward clerks, occupational therapy aides, recreational therapy aides, and psychology interns employed by the Employer; excluding professional employees, confidential employees, guards, all other employees, and supervisors as defined in the Act.

NEURO AFFILIATES d/b/a CROSSROADS HOSPITAL
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice of compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213-824-7357.

APPENDIX D.

Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, Case Nos. 82-7507, 82-7631.

United States Court of Appeals for the Ninth Circuit.

Neuro Affiliates d/b/a Crossroads Hospital, Petitioner/Cross-Respondent, v. National Labor Relations Board, Respondent/Cross-Petitioner. Nos. 82-7507, 82-7631.

Filed: Nov. 4, 1983.

Appeal from an Order of the National Labor Relations Board.

Argued and Submitted June 7, 1983.

Before: BROWNING, CHOY and FERGUSON, Circuit Judges*

Neuro Affiliates appeals a National Labor Relations Board (Board) bargaining order and the Board cross-petitions for enforcement. Because we find that the Board did not abuse its discretion in certifying Hospital and Service Employees Union Local 399 (the union) as bargaining agent for Neuro Affiliates' employees, we enforce the Board's order.

Neuro Affiliates argues that it need not bargain with the union as the Board abused its discretion in certifying the election, in not holding a hearing on Neuro Affiliates' objections to the election, and in failing to review the entire record relied upon by the Regional Director in certifying the election. It is well established that a hearing was required only if Neuro Affiliates supplied the Regional Director or the Board prima facie evidence raising substantial and ma-

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of Ninth Circuit for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to this court as precedent.

terial factual issues which, if resolved in its favor, would warrant setting aside the election. *E.g., Heavenly Valley Ski Area v. NLRB*, 552 F.2d 269, 271 (9th Cir. 1977). For a party to be entitled to a hearing, the party's "exceptions must state the specific findings that are controverted, and they must be accompanied by offers of proof in support of findings to the contrary." *NLRB v. Kenny*, 488 F.2d 774, 775 (9th Cir. 1973). "Mere disagreement" with the reasoning of or inferences drawn by the Regional Director does not raise a "substantial and material factual issue." *Id.* at 775-76 (quoting *NLRB v. Tennessee Packers, Inc.*, 379 F.2d 172, 178 (6th Cir.), *cert. denied*, 389 U.S. 958 (1967)).

Election Challenges

Neuro Affiliates objected to the election on the grounds that (1) the union distributed false and misleading information two days before the election; (2) the election challenges filed by the union disrupted the election; and (3) the Board agent supervising the election appeared to favor the union. The Board correctly held that no hearing was required as Neuro Affiliates failed to raise a factual issue with respect to any of these objections and that the election was valid.

In its challenge to election results based on pre-election conduct, Neuro Affiliates must show that the employees were so influenced by the questioned conduct that it was impossible for them to freely choose a representative. *NLRB v. Advanced Systems, Inc.*, 681 F.2d 570, 575 (9th Cir. 1982). Neuro Affiliates offered no evidence to the Regional Director or to the Board indicating that employees were or felt coerced in voting in the election. As was the case in *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011 (9th Cir. 1981), "[n]one of the activities alleged was so inherently intimidating that we are free to presume coercive effect. . . . [The record] is devoid of any indication of intimidation."

Id. at 1019.

The information sent out by the union prior to the election does not present grounds for setting aside the election. Neuro Affiliates introduced no evidence controverting the Regional Director's conclusion that the flyer did not constitute a material misrepresentation or significantly impair the election process. *Heavenly Valley Ski Area*, 552 F.2d at 272. The record supports his conclusion that the sequence of events leading to the mailing and the language used in the flyer leave the proper weight to attach to the flyer to the good sense of the voters.

Neuro Affiliates introduced no evidence to sustain its charge that the Board agent created the belief among employees that the Board wanted the union to win. The agent's behavior was consonant with Board policies in that she accepted union and employer challenges without trying to judge the validity of the challenges on the spot or making special arrangements to frustrate or facilitate challenges. The alleged conduct of the Board agent could not have destroyed confidence in the Board's election process or reasonably be interpreted as impugning the Board's election standards. *NLRB v. Eskimo Radiator Mfg Co.*, 688 F.2d 1315, 1319 (9th Cir. 1982).

Board Review of Incomplete Record

The Board's role in reviewing exceptions to the Regional Director's report is not to resolve factual disputes but "to determine whether there is a substantial and material dispute between the facts presented in the report and those presented in the exceptions." *NLRB v. Advanced Systems, Inc.*, 681 F.2d at 574. If the exceptions, construed most favorably to the petitioner, fail to provide any factual basis for overturning the report, the Board's failure to review the entire record will not justify a remand for further proceedings.

NLRB v. Eskimo Radiator Mfg. Co., 688 F.2d at 1318; *NLRB v. Belcor, Inc.*, 652 F.2d 856, 858-59 (9th Cir. 1981).

There were only two statements referred to in the Regional Director's report which Neuro Affiliates did not produce, and neither could have supported Neuro Affiliates allegations or raised a question of fact concerning the propriety of the election. First, the report referred to statements by union officials that they mailed the preelection flyers to employees on May 8. The date of the distribution is not relevant in this case as the Board found that the flyer itself did not constitute a material misrepresentation. Moreover, the union never disputed Neuro Affiliates' position regarding the timing of the flyer. The other possible employee-union statement allegedly not forwarded to the Board concerned the allegation that the union election challenges were improperly motivated. Even accepting that the statement was in the record, provided by the union, relied upon by the Director, and not forwarded to the Board, it could not have affected the outcome of this case. Although Neuro Affiliates alleged improper union motivation in challenging certain ballots, it offered no evidence on the crucial issue whether the union challenges affected the free choice of the voting employees. *See NLRB v. Belcor, Inc.*, 652 F.2d at 861. Any possible failure by the Director to forward these statements to the Board was thus harmless error. *Id.*

The Board's order will be ENFORCED.

APPENDIX E.

Judgment of the United States Court of Appeals for the Ninth Circuit, Case Nos. 82-7507, 82-7631.

United States Court of Appeals For the Ninth Circuit.

Neuro Affiliates d/b/a Crossroads Hospital, Petitioner/Cross-Respondent, vs National Labor Relations Board, Respondent/Cross-Petitioner, NLRB# 31-CA-12030, No. 82-7507 & 82-7631.

Upon Petition to Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board on June 7, 1983 and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Order of the said National Labor Relations Board in this Cause be, and hereby is ENFORCED.

Filed and entered: November 4, 1983.

APPENDIX F.

Statutory Provisions Involved.

1. Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1), provides:

> "(a) It shall be an unfair labor practice for an employer — (1) to interfere with, restrain, or coerce, employees in the exercise of the rights guaranteed in section 7;"

2. Section 8(a)(5) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(5), provides:

> "(a) It shall be an unfair labor practice for an employer — (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

3. Section 9(c) of the National Labor Relations Act, as amended, 29 U.S.C. § 159(c), provides:

> "(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the person filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with reg-

ulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purpose specified in subsection (b) the extent to which the employees have organized shall not be controlling.

4. 28 U.S.C. § 2112(b) provides:

(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the rules prescribed under the authority of section 2072 of this title may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules prescribed under the authority of section 2072 of this title designate to be included therein, or (3) as the court upon motion of a party or, after a prehearing conference, upon its own motion may by order in any such proceeding designate to be included therein. Such a stipulation or order may provide in an appropriate case that no record need be filed in the court of appeals. If, however, the correctness of a finding of fact by the agency, board, commission, or officer is in question all of the evidence before the agency, board, commission, or officer shall be included in the record except such as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned

or in the court agree to omit as wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer which the court subsequently determines to be proper for it to consider to enable it to review or enforce the order in question the court may direct that such additional portion of the proceedings be filed as a supplement to the record. The agency, board, commission, or officer concerned may, at its option and without regard to the foregoing provisions of this subsection, and if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation.

No. 83-1252

In the Supreme Court of the United States

OCTOBER TERM, 1983

NEURO AFFILIATES, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly overruled, without an evidentiary hearing, two of the Employer's election objections.

2. Whether, in the circumstances of this case, the court of appeals properly held that any error committed by the Regional Director in failing to transmit to the Board all affidavits collected in his investigation of the Employer's election objections constituted harmless error and therefore did not preclude enforcement of the Board's bargaining order.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

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NEURO AFFILIATES, ETC., PETITIONER

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35-38) is not reported. The decision and order of the National Labor Relations Board (Pet. App. 21-32) and the decision in the underlying representation proceeding (Pet. App. 1-20) are noted at 263 N.L.R.B. No. 29, but also are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1983 (Pet. App. 39). The petition for a writ of certiorari was filed on January 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, as well as another statutory provision (28 U.S.C. 2112(b)) on which petitioner relies, are set forth at Pet. App. 40-43.

STATEMENT

1. Pursuant to stipulations between petitioner, Neuro Affiliates d/b/a Crossroads Hospital (the Employer), and the Hospital and Service Employees Union Local 399, AFL-CIO (the Union), a representation election was held on May 15, 1981, in a unit of nonprofessional employees at the Employer's facility in Burbank, California. The tally of ballots showed 36 votes for the Union and 17 against; there were 13 challenged ballots and 1 void ballot. The challenged ballots were not sufficient in number to affect the outcome of the election. Pet. App. 1.

The Employer filed objections to the election, alleging, inter alia, that the Union had distributed a misleading flyer two days prior to the election, that the Union's ballot challenges were improper and discriminatory, and that, because the Board agent conducting the election permitted the Union to make those ballot challenges, the agent gave an impression of favoring the Union. Pet. App. 1-13.

The Regional Director investigated the Employer's objections. During the course of the investigation, the Employer was offered an opportunity to submit evidence, and it submitted documents, including witness affidavits, to the Regional Director (Pet. 17 n.15; Pet. App. 38). Following his own investigation and his consideration of the Employer's evidence, the Regional Director recommended that the objections be overruled in their entirety and that the Union be certified. Attached to the Regional Director's report were certain exhibits, including campaign literature of the Union and the Employer, on which the Regional Director had relied. Pet. App. 1-18.

The Employer filed exceptions to the Regional Director's recommendation and requested a new election or a hearing. In its exceptions, the Employer reiterated its objections to the election and asserted that the Regional Director had

abused his discretion by failing to transmit the entire record to the Board. Pet. App 23. The Employer attached its affidavits to its brief in support of its exceptions (R. Doc. No. 12).[1] On March 4, 1982, the Board denied the exceptions, adopted the findings and recommendations of the Regional Director, and certified the Union as bargaining representative (Pet. App. 19-20).

2. The Employer subsequently refused to bargain with the Union. The Board, finding that the Employer had thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), entered a bargaining order (Pet. App. 21-34). The Employer appealed on the grounds that its refusal to bargain was lawful because its election objections were meritorious and because, in any event, the Board did not have the full record before it when it overruled those objections and certified the Union (Pet. App. 35).

3. The court of appeals enforced the Board's order in an unpublished memorandum opinion (Pet. App. 35-39). The court agreed with the Board that the Employer had failed to raise any factual issue entitling it to a hearing on its election objections, and had failed to offer any evidence that the allegedly objectionable conduct had coerced employees in voting (*id.* at 36). It also noted (*id.* at 37) that the Employer had submitted no evidence that the Union's pre-election flyer contained any material misrepresentation and that the Board was warranted in concluding that the voters could adequately evaluate the flyer. With regard to the claim that the Board agent's behavior gave an appearance of bias, the court noted (*ibid.*) that there was no evidence to this effect

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[1] "R. Doc. No." refers to the document number in the record filed in the court of appeals.

and that her handling of the ballot challenges was "consonant with Board policies" and could not reasonably have been construed as "impugning the Board's election standards" (*ibid.*).

Finally, the court rejected the Employer's claims regarding the adequacy of the record before the Board. The court found that the record was complete except for two witness statements referred to by the Regional Director. It observed that neither of these statements could have supported the Employer's contentions or raised a material issue of fact, since the Regional Director referred to them merely in connection with undisputed matters or matters irrelevant to the grounds on which the objections were overruled. Pet. App. 37-38. The court accordingly held (*id.* at 38) that "[a]ny possible failure by the [Regional] Director to forward these statements to the Board was thus harmless error."

ARGUMENT

The unpublished decision of the court of appeals is correct.[2] Moreover, it concerns highly fact-bound determinations that raise no issue warranting review by this Court.

1. The Employer contends that the Board improperly overruled an election objection pertaining to a flyer distributed by the Union to the employees prior to the election (Pet. 7-10) and that it erred in failing to order a hearing on another objection pertaining to the Board agent's treatment of ballot challenges made by the Union during the election (Pet. App. 16-20). The Employer further contends (Pet.

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[2]Because the court of appeals concluded that the issues presented by this case do not meet the standards set by Rule 21 of the rules of that court for disposition by written opinion, it ordered that the opinion below not be published and prohibited citation of it as precedent. Pet. App. 35 n.*.

10-12) that the court of appeals applied an incorrect standard of review in upholding the Board's overruling of these objections. These contentions are without merit.

a. Prior to the election, the Employer distributed to its employees literature suggesting that their wages were better than those of employees in other area hospitals, that they should question the Union on this matter, and that they should be wary of being "easily swayed by [the Union's] pie-in-the-sky promises" (Pet. App. 3). The paragraph concluded by asking, "[w]hat, *precisely*, has been offered in writing?" (*ibid.* (emphasis in original)). The Union responded with the challenged campaign flyer that recited certain "guarantees" made by the Union to the employees and listed certain "guarantees" respecting wages, benefits, and grievance-handling that it suggested the employees seek to have the Employer's administrator sign (Pet. App. 2-3, 14-17). The Regional Director rejected the Employer's contention that the election should be overturned because the Union's flyer represented a deceptive effort to ridicule the Employer and trap it into committing unfair labor practices (*id.* at 3-5).

The Regional Director reasoned that, as a response to the Employer's literature implicitly challenging the Union to put its promises into writing, the Union's flyer amounted to "no more than typical campaign rhetoric of the type amenable to employee evaluation" (Pet. App. 4). The court of appeals properly declined to reverse that determination, agreeing that, under the circumstances, the weight to be attached to the Union's flyer could be left "to the good sense of the voters" (*id.* at 37). See also *Letter Carriers* v. *Austin*, 418 U.S. 264, 277 n.12 (1974) ("[w]ide latitude for what is written and said in election campaigns is necessary to insure the free exchange of information and opinions * * *"); *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 60 (1966)

(citing with approval Board's policy, explained in *Stewart-Warner Corp.*, 102 N.L.R.B. 1153, 1158 (1953), of leaving the appraisal of campaign propaganda "to the good sense of the voters").

In contending (Pet. 8-10) that this ruling conflicts with the Third Circuit's opinion in *Jamesway Corp.* v. *NLRB*, 676 F.2d 63 (1982), the Employer disregards a number of significant distinctions between the two cases. In the first place, the handbill that was at issue in *Jamesway* was not, as in this case, a response to the employer's own similar campaign literature. Moreover, in concluding that the handbill constituted objectionable conduct, the *Jamesway* court emphasized (*id.* at 69-70) both that the document included a misleading suggestion calculated to alarm newly hired employees about possible layoffs if the union lost the election[3] and that this threat was underscored by an oral statement made by a member of the union's organizing committee. It was the addition of these latter actions — the union's falsely creating the impression that the employer would lay off newly hired employees unless the union won the election — that the Third Circuit found to be coercive, not the mere guarantee request. *Ibid.* By contrast, here the Union simply suggested that the employees request the Employer to sign

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[3]In *Jamesway*, the Union had presented the following document to the employer on the eve of the election (676 F.2d at 69):

> We, the District 65 organizing committee would like a guarantee in writing that the Company will not lay-off or reduce any of the work force of Jamesway Store # 32 after the election or in the future.
>
> District 65 Organizing Committee[.]

The challenged handbill contained a copy of the foregoing document "marked with a distinctive notation" (*ibid.*):

> Mr. Madison & Mr. Christo *Refused* to signed [sic] this in order to protect the New Worker Hired in the Last 3 or 4 Mo.

certain guarantees; the Union made no additional statements to employees suggesting that a refusal by the Employer would mean that it would reduce employee benefits or otherwise retaliate against the employees. Nor was the Union's brochure in this case directed to a particularly vulnerable group of employees.

Finally, the *Jamesway* court relied heavily (676 F.2d at 71) on the closeness of the balloting results in that case — assuming the two unresolved ballot challenges were resolved in the employer's favor, the union would have won by only one vote. None of those circumstances is present here. In any event, even if the circumstances of these two cases were similar, the question whether a Board election should be overturned because of the distribution of a particular type of flyer not known to have been distributed in more than two union campaigns is not of sufficient importance to warrant review by this Court.[4]

b. During the election, the Union's observer challenged the ballots of 11 of the 67 employees who voted, claiming that they were professional or confidential employees — categories specifically excluded from the unit pursuant to

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[4]Because the Board correctly concluded that the flyer in the present case did not constitute a material misrepresentation, there was no need for it to consider whether the Employer had an opportunity to make an adequate reply under the standard for assessing election misrepresentations set out in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 224 (1962). The cases cited by the Employer (Pet. 9 n.9) respecting ability to reply therefore are inapposite. In any event, in *Midland National Life Insurance Co.*, 263 N.L.R.B. 127 (1982), the Board overruled *Hollywood Ceramics* and announced that it "will no longer probe into the truth or falsity of the parties' campaign statements" (*id.* at 133), but rather will assume that " 'employees [are] mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it' " (*id.* at 132, quoting *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311, 1313 (1977)). Because the Board no longer has occasion to rule on issues concerning a party's ability to reply to campaign misrepresentations, review by the Court of that issue is unnecessary.

the parties' election agreement (Pet. App. 8). The Board agent processed all challenged ballots according to the Board's published policies,[5] and she explained those policies to employees who expressed concern over having their ballots challenged (*ibid.*). After giving the explanation, she asked the employees to leave the polling area so as not to disrupt the election (*id.* at 9).

Because the voters challenged by the Union were in job classifications included in the unit stipulation, the Employer contended that the Union must have had discriminatory motives for challenging them and that the Board agent's processing of the challenges therefore gave the appearance of agency bias (Pet. App. 5-8).[6] The Employer

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[5]Procedures for handling ballot challenges are set out in *National Labor Relations Board Casehandling Manual: Representation Proceedings*, Pt. 2, §§ 11338 *et seq.* (Oct. 1975). Under these procedures, a party may challenge a voter's eligibility without unduly "disrupting the regular flow of votes" (*id.* at § 11338). The eligibility issue is determined in a post-election proceeding if it becomes necessary — that is, if it turns out that the challenged ballots could affect the election results. A challenged voter secretly records his vote in the same manner as any other voter, but instead of immediately depositing his folded ballot into the ballot box, he first seals it in a special envelope given him by the Board agent (*id.* at § 11338.1). The voter's identity and the identity of the challenging party are recorded on a removable stub attached to the envelope (*ibid.*). The Manual further provides (*id.* at § 11338.4):

> Arguments on the merits of a challenge should not be permitted. The challenge steps outlined above should be taken quietly and quickly, and the regular voting flow should be impeded as little as possible. The Board agent should be prepared to explain to the voter, quickly and lucidly, the measures which will be taken to protect the secrecy of the challenged ballot.

See also 29 C.F.R. 102.69(a) and (b).

[6]The Employer linked this objection to another objection concerning the Board agent's refusal to permit the Employer's observer to challenge a voter after he had already voted (Pet. App. 5-8). The Employer is not pressing that objection in its petition to this Court.

submitted as evidence a note written by Bruce Powers, a Union election observer, several days after the election, in which he explained to three employees why he had challenged them (Pet. App. 9, 18), and an affidavit by one of the Employer's election observers, Estrella Gonzalez, stating that she personally knew that eight of the 11 voters challenged by the Union were anti-union employees, that the Union had not challenged some pro-union employees in the same classifications, and that she and other challenged voters were upset at the idea of their being challenged because of their pro-employer sympathies (Pet. 17 n.15). One of the challenged voters, Gonzalez asserted, had discussed her opposition to being challenged with employees waiting in line to vote. There was no allegation, however, that any employee had been told by the Union or by any supporter of the Union that anti-union employees would be challenged (Pet. App. 8-9).

The Regional Director concluded that the note from Powers did not plainly suggest that discriminatory considerations had motivated the Union's challenges, and he reasonably observed that the note itself, written days after the election, could not have had any impact on the election (Pet. App. 10). His ultimate conclusion was that the Board agent did not, by her conduct, tolerate any evident abuse of the election procedure by the Union[7] and that she "engaged in no conduct that tended to foster in the minds of voters the impression that the Board was not neutral as between the choices on the ballot" (*id.* at 11).

The Employer does not contend that the Board agent's handling of the Union's challenges departed from agency guidelines (note 5, *supra*), and the court of appeals

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[7]An employee is not necessarily immunized from challenge merely because his job title is included in a unit stipulation. See *W. W. Grainger, Inc.*, 207 N.L.R.B. 966, 966-967 n.1 (1973); *Fisher-New Center Co.*, 184 N.L.R.B. 809, 810 (1970).

reasonably concluded that none of the Employer's specific allegations concerning events that could have been observed by the employees or the Board agent was sufficient to "sustain its charge" of apparent Board agent bias or to warrant a hearing (Pet. App. 37). That conclusion is sound. The Employer's allegations concerning events that could be observed by employees eligible to vote established no incidents that would meet the test for overturning a Board election, *i.e.*, conduct likely to interfere " 'with the employees' exercise of free choice to such an extent that [it] materially affected the results of the election.' " *NLRB* v. *Bostik Division, USM Corp.*, 517 F.2d 971, 975 (6th Cir. 1975) (quoting *NLRB* v. *Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969)). Accord, *Worley Mills, Inc.* v. *NLRB*, 685 F.2d 362, 368 (10th Cir. 1982), and cases there cited. It is well established that the Board is not required to hold a hearing when there is nothing to be heard. *NLRB* v. *Carolina Natural Gas Corp.*, 386 F.2d 571, 574 (4th Cir. 1967); *NLRB* v. *Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245, 249 (5th Cir. 1964).

c. In upholding the Board's overruling of the Employer's election objections, the court of appeals applied an "abuse of discretion" standard (Pet. App. 35). The Employer contends (Pet. 10-12) that use of this standard of review conflicts with the Third Circuit's decision in *Jamesway Corp.* v. *NLRB*, 676 F.2d at 66-69, in which the court applied a "substantial evidence" standard in reviewing the Board's determination of the impact of allegedly objectionable conduct on a representation election. Any such conflict has been eliminated, however, by a subsequent en banc decision, *NLRB* v. *ARA Services, Inc.*, 717 F.2d 57, 68 (1983), in which the Third Circuit implicitly overruled *Jamesway* on that point, stating that another prior decision suggesting anything other than an "abuse of discretion" standard for reviewing Board election determinations "must in the future be disregarded."

Recently, in *Mosey Manufacturing Co.* v. *NLRB*, 701 F.2d 610 (1983), the en banc Seventh Circuit embraced a "substantial evidence" standard for reviewing the Board's application of its election rules to "contested facts," including such questions as whether a particular misrepresentation would be likely to affect an election (*id.* at 615). The present case, however, provides no basis for reviewing any conflict in standards of review. In considering the standards applied by other courts of appeals, the *Mosey* court read the Ninth Circuit's decisions as effectively applying a substantial evidence standard even when the term "abuse of discretion" was used. 701 F.2d at 614. The Seventh Circuit, therefore, apparently perceives no conflict with the Ninth Circuit on this question.

To be sure, in the Board's view, "abuse of discretion" is the proper standard and it differs from the "substantial evidence" standard to the extent that the outcome of some review proceedings could be affected.[8] In the present case,

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[8]The Board agrees that the "substantial evidence" standard properly applies to any Board findings of narrative fact — that is, what was said or done in a given situation. With respect to the Board's determinations of whether assumed or undisputed facts constitute adequate grounds for setting aside an election, however, the appropriate inquiry for a reviewing court is whether the Board has applied its own election policies in a manner that is not arbitrary, capricious, or an abuse of discretion. This is the same standard that is applied in other areas in which Congress has delegated broad discretion to the Board. See *Shepard* v. *NLRB*, No. 81-1627 (Jan. 18, 1983), slip op. 4-5 (devising appropriate remedies for unfair labor practices); *NLRB* v. *Magnetics International, Inc.*, 699 F.2d 806, 812 & n.5 (6th Cir. 1983) (decision whether to defer to arbitration); *Liquor Salesmen's Union Local 2* v. *NLRB*, 664 F.2d 318, 323 (2d Cir. 1981) (same); *NLRB* v. *Krieger-Ragsdale & Co.*, 379 F.2d 517, 520 (7th Cir. 1967), cert. denied, 389 U.S. 1041 (1968) (determining appropriate bargaining units). Due respect for Congress's even broader delegation of discretion to the Board in the election area requires the conclusion that the Board's ultimate findings here should be accorded no less deference.

Furthermore, although "[t]here are no talismanic words that can avoid the process of judgment," *Universal Camera Corp.* v. *NLRB*, 340

however, as our discussion of the allegations underlying the Employer's objections makes clear (pages 5-10, *supra*), the Board's determination should survive scrutiny under either standard of review.

2. The Employer erroneously asserts (Pet. 12-15) that applicable precedents in the Fourth, Fifth, and Sixth Circuits conflict with the court of appeals' holding that any error committed by the Regional Director in failing to transmit to the Board all affidavits collected in his investigation of the Employer's election objections constituted harmless error and therefore did not preclude enforcement of the Board's bargaining order.

The Fourth Circuit precedent on which the Employer relies does not avail it. In *National Posters, Inc.* v. *NLRB*, 720 F.2d 1358, 1361-1362 (4th Cir. 1983), the court explained that *NLRB* v. *Cambridge Wire Cloth Co.*, 622 F.2d 1195 (4th Cir. 1980) (Pet. 14-15), was based on the court's view that the Board's then-existing rule regarding documents to be transmitted to the Board in election objections cases in which no hearing was held (29 C.F.R. 102.69(g) (1981)) was ambiguous and failed to put parties challenging an election on notice that it was their responsibility to transmit to the Board any evidence they wished the Board to consider. The Board has since amended that rule to make it even clearer that supporting affidavits are not part of the record unless submitted to the Board by the employer (46 Fed. Reg. 45922-45924 (1981)), and the Fourth Circuit regards *Cambridge Wire Cloth* as inapplicable to any case affected by the clarified rule. 720 F.2d at

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U.S. 474, 489 (1951), the abuse of discretion standard best alerts courts to "the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). See also *Mosey Manufacturing Co.* v. *NLRB*, 701 F.2d at 618-619 (Swygert, J., dissenting).

1362. Although the Employer in this case filed its exceptions to the Regional Director's report before the date on which the Board published its clarified rule (September 14, 1981), it was not misled by any lack of clarity in the prior rule, because it in fact attached to its brief in support of the exceptions the documentary evidence, including affidavits, that it had submitted to the Regional Director (R. Doc. No. 12). Any conflict between the Ninth Circuit and the Fourth Circuit concerning the proper record in an election objections proceeding therefore is both of diminishing general significance and insubstantial in the context of this case.

In decisions rendered after those on which the Employer relies (Pet. 14-15), both the Fifth and Sixth Circuits have made it clear that, although they regard it as error per se for the Regional Director to fail to transmit to the Board any documentary evidence on which he has relied in making his findings on election objections, such error will not automatically require the court to deny enforcement of the Board's order. *Kitchen Fresh, Inc.* v. *NLRB*, 716 F.2d 351, 356 (6th Cir. 1983) ("[t]his error may serve as a basis for denying enforcement * * * only if the exceptions present substantial factual issues"); *NLRB* v. *Fruehauf Corp.*, 720 F.2d 1398, 1402 (5th Cir. 1983) ("we have never held that a remand will follow in every case in which [the] preferred practice [of transmitting all documentary evidence relied upon] is not followed").[9] Thus, it is not at all apparent that the Fifth and

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[9]In *Fruehauf*, the Board had not simply adopted the Regional Director's findings, as it did here (Pet. App. 19). Rather, it had corrected at least one of his findings and made a factual assumption about one of the issues (720 F.2d at 1402). The court regarded the Board's modifications as an acknowledgement that resolution of the issues raised by the employer in its exceptions "require[d] factual review" (*ibid.*), and concluded that such review was inadequate without scrutiny of the underlying affidavits (*id.* at 1403). In the present case, as the court of appeals pointed out (Pet. App. 38), the only factual findings based on evidence that was not before the Board were irrelevant to the decision adopted by the Board.

Sixth Circuits would have reached a different result had they decided the present case.[10]

In a decision issued before *Kitchen Fresh* and *Fruehauf*, the Seventh Circuit took a different view, holding in *Prairie Tank Southern, Inc.* v. *NLRB*, 710 F.2d 1262, 1265, 1267 (1983), that, under its rule established in *NLRB* v. *Allis-Chalmers Corp.*, 680 F.2d 1166 (1982), when the Regional Director fails to transmit to the Board all affidavits collected in his investigation of election objections the unfair labor practice order predicated on the decision in that representation case "cannot be enforced." The apparent conflict is not, however, ripe for decision. In *Allis-Chalmers*, the Seventh Circuit expressly relied on what it viewed as the "per se" rules of the Fifth and Sixth Circuits (680 F.2d at 1168-1169). Until the Seventh Circuit considers the actual rules of those circuits (see page 13, *supra*) and rejects them, there is no need for intervention by this Court.

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[10] The Employer's claim (Pet. 15-16) of intra-circuit conflict also is without merit, as the Ninth Circuit's recent decision in *NLRB* v. *West Coast Liquidators, Inc.*, No. 83-7121 (Feb. 9, 1984), slip op. 9 n.2, makes clear. There the court explained the decisions on which the Employer relies (Pet. 15-16) as entirely consistent with the rule that remand will not be required where no prejudice is shown to have resulted from the failure to transmit affidavits. Of course, intra-circuit conflicts are not, in any event, grounds for review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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